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No. 75-1840

# In the Supreme Court of the United States

OCTOBER TERM, 1976

HAL HAVILAND, PETITIONER

*v.*

EARL L. BUTZ, SECRETARY OF AGRICULTURE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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Petitioner owns and operates an itinerant professional animal act which features dogs and ponies (Pet. App. 2a). The act has appeared before paying audiences in various states and on commercial television (*ibid.*; Pet. 4). The Department of Agriculture notified petitioner that he was violating the licensing provisions of Section 7 of the Animal Welfare Act of 1970, 84 Stat. 1561, 7 U.S.C. 2136, by exhibiting animals to the public for compensation without a license and that proceedings to compel compliance might be instituted against him (Pet. App. 2a). After obtaining an exhibitor's license, petitioner instituted this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that he was not subject to regulation under the Act. The district court denied relief, and the court of appeals affirmed (Pet. App.). It held that petitioner was an "exhibitor" required to obtain a license, as that term is defined in 7 U.S.C. 2132(h) (Pet. App. 9a-10),

and that his animal act was subject to federal regulation under the Commerce Clause because of its multi-state travel (Pet. App. 11a-12a). It also held that the Act's regulation of some, but not all, aspects of interstate trafficking in animals did not deny petitioner equal protection (Pet. App. 13a-16a).

1. Petitioner contends (Pet. 5) that the Secretary lacks statutory authorization to regulate his animal act.

The Animal Welfare Act is designed to ensure humane care and treatment of "animals intended for use * * * for exhibition purposes * * * ." H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 9 (1970). Section 3(h) of the Act, 7 U.S.C. 2132(h), provides that the class of "exhibitors" which must obtain licenses under the Act includes "carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not * * *." The legislative history of this provision shows that it was intended to extend the requirements of the Act to all persons utilizing animals for purposes of exhibition, including road shows. H.R. Rep. No. 91-1651, *supra,* at 2. The Secretary's implementing regulation therefore defines "exhibitor" as including "carnivals, circuses, *animal acts,* and zoos" (emphasis supplied). 9 C.F.R. 1.1(v).

As the court of appeals properly observed, the statutory definition of "exhibitor" was intended to be partial and illustrative, rather than exhaustive (Pet. App. 8a-10a). The Secretary reasonably concluded that traveling animal acts such as petitioner's involved the public exhibition of animals for compensation and thus fell within the statutory definition of an "exhibitor" (see Pet. App. 16a, n. 64), although not specifically so denominated in Section 3(h). His interpretation of this new statute is entitled to substantial deference. See, *e.g., Udall* v. *Tallman,* 380 U.S. 1, 16. The court of appeals therefore correctly held that petitioner's animal show was subject to regulation under the Act (Pet. App. 9a-10a).



2. Petitioner contends (Pet. 7) that the multi-state performances of his animal act are not subject to federal regulation under the Commerce Clause. However, the evidence showed that between August 1, 1972, and August 16, 1973, petitioner's animal show appeared in 13 states on approximately 73 different dates and that it performed on commercial television on three occasions (Pet. App. 2a, nn. 2-3). As the court below correctly held, although each of these discrete performances may have been a local exhibition, the pattern of traveling from state to state to perform, and the utilization of the facilities of interstate commerce to reach audiences, sufficiently affected interstate commerce to subject petitioner's animal act to federal regulation (Pet. App. 10a-12a). See 7 U.S.C. 2132(d); *Flood* v. *Kuhn,* 407 U.S. 258, 282-283.[1]

3. Petitioner also contends (Pet. 8) that the Animal Welfare Act creates an invidious classification that denies equal protection in that it regulates carnivals, circuse animal acts and zoos while excluding from coverage retail pet stores, state and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences. 7 U.S.C. 2132(h). However, "the Equal Protection Clause does not require that [the government] must

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[1]Similarly, as the court below correctly held (Pet. App. 6a-7a, n. 22), the interstate transportation of these animals for exhibition purposes satisfied the statutory requirement that an exhibitor must exhibit an animal "the intended distribution of which affects commerce, or will affect commerce,* * * " to be subject to the Act. 7 U.S.C. 2132(h). The legislative history of the Act, which demonstrates a clear intent to bring traveling exhibitors under the regulatory framework, supports the court of appeals' determination that the term "distribution" is synonymous with "transportation" in this context. See H.R. Rep. No. 91-1651, *supra,* at 2, 9-10.

choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U.S. 471, 486-487. The government may proceed one step at a time, regulating the facets of a problem that appear most urgent and leaving other aspects unresolved. *Jefferson* v. *Hackney*, 406 U.S. 535; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483. As the evolution of the Animal Welfare Act demonstrates, Congress has chosen to extend federal regulation cautiously in this area, due in part to the enormous potential expense of enforcing a more inclusive statute, and the court of appeals properly refused to interpose its judgment as to the appropriate stopping point. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1976.